COPY BOUND CLOSE IN CENTER

TABLE OF CONTENTS

	Page
Index to authorities cited	ii
Jurisdiction	1
Question Presented	1
Statement of the Case	2
Reasons for Denying the Writ	6
Argument	6
Conclusion	26
Appendix	29

INDEX TO AUTHORITIES

Page

Braunfeld vs. Brown, Commissioner of Police, 366 US 599 25

Brown vs. Circuit Judge, 75 Mich 274 (42 N.W. 827, 5 L.R.A. 226, 13 Am. St. Rep. 438) 13

Dunham vs. Tilma, 191 Mich 688 ..... 11, 17

Evans vs. Gore, 253 US 245 (40 S Ct 550, 64 L ed 887, 11 ALR 519) 17

Ex parte Robinson, 19 Wall. 510 11

Gallagher, Chief of Police vs. Crown Kosher Super Market of Massachusetts, Inc., 336 US 617 25

Kavanagh, et al vs. Brown, et al, 206 F Supp 479 24

Kavanagh, et al vs. Brown, Treasurer of Michigan, et al, 371 US 35, 9 L ed 2nd 112 25

Lindsley vs. Natural Carbonic Gas Co., 220 US 61, 78, 79, 55 L ed 369, 377, 378, 31 S Ct 337, Ann Cas 1912C 160 26

McGowan vs. State of Maryland, 366 US 420 25

Metropolitan Co. vs. Brownell, 294 US 580, 584, 55 S Ct 538, 540 (1935) 25

Mooney vs. Unemployment Compensation Commission, 336 Mich 344, 352 14

Nichols vs. Superior Judge (1902), 130 Mich 187 ..... 8, 13

People ex rel Covell vs. Kent County Treasurer, 36 Mich 332 ..... 9, 13

Streeter vs. Paton, 7 Mich 341 10

Taylor vs. Auditor General, 342 Mich 265 ..... 4, 15

Taylor vs. Auditor General, 360 Mich 146 ..... 5, 6, 16, 21, 24

Taylor vs. Auditor General, 367 Mich 256 ..... 4, 20, 22

Two Guys from Harrison-Allentown, Inc. vs. McGinley District Attorney, 366 US 582 25

Wyandotte Rolling-Mills Co. vs. Robinson, 34 Mich 428 9

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1962

No.

THADDEUS B. TAYLOR,

Petitioner,

vs.

STATE OF MICHIGAN, et al.,

Respondents.

JURISDICTION

Jurisdiction is adequately alleged except that no substantial federal question is presented.

QUESTION PRESENTED

In the view of respondents, the only question presented is:

1. Whether the Michigan Constitution in depriving petitioner as judge of the superior court of Grand Rapids of the benefit during his current term of office of an increase in salary resulting from legislative act adopted following his election, while permitting circuit judges, who are excepted from the constitutional bar, to receive the

benefit thereof constitutes invidious discrimination in violation of the equal protection clause of the 14th Amendment?

STATEMENT OF THE CASE

Petitioner is a former judge of the superior court of Grand Rapids. Presently there is but one superior court within the State of Michigan, and reference herein to the superior court refers to the superior court of Grand Rapids,[1] Petitioner instituted this action in the court of claims of the State of Michigan to recover the difference between the salary paid by the State to circuit judges during the period from January 10, 1942 to May 1, 1959, and that paid to petitioner as judge of the superior court during the same period, relying upon the following provision of section 6 of Act No. 49, PA 1875, being CLS 1956 §727.6, MSA 1959 Cum Supp §27.3616:

> "The judge of said superior court shall receive from the treasury of the state of Michigan the same annual salary as may be payable to circuit judges, * * *."

---

[1]

The superior court of Grand Rapids is a municipal court of record. There are presently two other municipal courts of record in Michigan: the Detroit Recorder's Court, upon which the statute confers not only criminal jurisdiction comparable to that of circuit courts, but also civil jurisdiction both at law and in equity. CL 1948 §725.23, MSA §27.3963. However, as a practical matter, the civil jurisdiction exercised is presently limited to condemnation cases. The Common Pleas Court of Detroit was originally established as the successor to justices of the peace, but by virtue of subsequent amendment is now a court of record and has been vested with jurisdiction concurrent with the circuit court in civil actions wherein the debt or damages do not exceed $3,000. CLS 1956 §728.1, MSA 1959 Cum Supp §27.3651.

The discrepancy between the amount of salary paid to petitioner and that paid during the same period to circuit judges arose of necessity from the application of Article XVI, Section 3, of the Michigan Constitution, which provides:

> "* * * Salaries of public officers, except circuit judges, shall not be increased, nor shall the salary of any public officer be decreased, after election or appointment."

Thus, while circuit judges being exempt from such constitutional bar received the benefit of increases in salary commencing upon the effective date of the statutes providing therefor, petitioner, not being a circuit judge, received the benefit of each such increase effective upon the date of commencement of his next ensuing term of office. During the period in question, petitioner served terms of office commencing on

May 1, 1941

May 1, 1947

May 1, 1953.

Petitioner was elected as judge of the superior court for those terms at an election held on the first Monday in April of the respective years. During the same period the following acts were adopted by the Michigan legislature increasing the salary of circuit judges:

Act No. 184, PA 1941, effective January 10, 1942, increasing the annual salary from $6,000 to $7,000.

Act No. 103, PA 1949, effective September 23, 1949, increasing the annual salary from $7,000 to $9,000.

Act No. 155, PA 1954, effective January 13, 1954, increasing the annual salary from $9,000 to $12,500.

From a judgment in favor of petitioner entered in the case at bar in the court of claims appeal was taken to the Michigan Supreme Court which court by a divided opinion reversed the same. *Taylor vs. Auditor General,* 367 Mich 256.

The cited opinion of the Supreme Court is the third time that this series of litigation has reached that court.

In *Taylor vs. Auditor General,* 342 Mich 265 (1955), petitioner sought mandamus to require the Auditor General to pay him a salary at the same annual rate as was being paid by the state to circuit judges following August 13, 1954, the effective date of Act No. 155, by which the salary was increased to $12,500 per annum. In denying issuance of the writ, the Michigan Supreme Court in an unanimous opinion noted that petitioner admitted that he was not a circuit judge, and held that payment to him at the increased rate provided by an act adopted by the legislature following his election was prohibited by Article XVI, Section 3, of the Michigan Constitution, above quoted. Noting petitioner's reliance upon section 6 of Act 49, PA 1875, as amended by Act No. 275, PA 1949, the opinion stated at page 267:

> "But the 1949 act makes no provision for an increase of salaries of superior court judges during term. If it should be so construed, it would run counter to the inhibition in article 16, §3. * * *."

No federal question was raised either in that action or by the pleadings in the court of claims case which resulted in *Taylor vs. Auditor General*, 360 Mich 146 (1960). However, the issue of denial of the equal protection clause of the 14th Amendment to the federal Constitution was first raised by Mr. Justice Black in his dissenting opinion 360 Mich 147, 167 et seq. Presumably an addendum to the majority opinion was thereupon drafted for the purpose of answering such contention, 360 Mich 152, et seq. The latter opinion pointed out the historical basis of that and similar clauses inserted in various state constitutions prohibiting increasing or decreasing of salaries of public officials following their election or appointment. The opinion acknowledged the resulting "actual inequality" which frequently arises even between those occupying the same office and doing the same work, but who are elected for non-simultaneous terms. The opinion concluded however that the equal protection clause of the 14th Amendment was not violated thereby.

Following the issuance of that opinion and the remanding of the case to the court of claims, petitioner amended his pleadings to allege that he was of the same general class as circuit judges and that the exception to the bar of Article XVI, Section 3, relating to "circuit judges" should be construed to include therein judge of the superior court of Grand Rapids, and that otherwise he would be deprived of equal protection in violation of the 14th Amendment to the federal Constitution. The trial court overruled various defenses raised by respondents and allowed judgment for the full amount claimed. Upon appeal, the Supreme Court, through its majority opinion, ordered the judgment entered in the court of claims set aside and the entry of judgment for respondents. In so holding, the majority rejected petitioner's contention that the placing of a construction upon the term "circuit judges" as used in the exception to the

constitutional prohibition contained in Article XVI, Section 3, against increasing of the salary of public officers following election or appointment, so as to exclude petitioner as judge of the superior court of Grand Rapids resulted in violation of the equal protection clause of the 14th Amendment.

Respondents contend that no substantial question is presented and that accordingly the petition for the issuance of writ of certiorari should be denied.

REASONS FOR DENYING THE WRIT

As held by the Michigan Supreme Court in its prior decision in *Taylor vs. Auditor General,* 360 Mich 146, 152-156, the denial to petitioner as judge of the superior court of Grand Rapids of the benefit during his current term of office of an increase in salary resulting from legislative act adopted after his election by reason of a constitutional bar from which circuit judges are excepted, does not result in invidious discrimination violative of the equal protection clause of the 14th Amendment. Respondents therefore challenge the presentation by this case of a substantial federal question.

ARGUMENT

Article XVI, Section 3, of the 1908 Michigan Constitution prohibits the increasing or decreasing of the salaries of public officers after election or appointment.[2] Circuit

---

[2]

The inhibition against raising or lowering salaries does not apply to officials appointed for an indefinite term. *Haack vs. Banish,* 287 Mich 592. Nor does it bar an officer receiving an automatic change

COPY BOUND CLOSE IN CENTER

judges are excepted from the bar against increasing of salaries following their election.

The Michigan court has consistently held that while the jurisdiction and powers conferred upon the superior court of Grand Rapids are coordinate in many respects of those of a circuit court, nevertheless

1. The court has never held the superior court to be a circuit court, but instead

2. The superior court is a municipal court created by legislative action pursuant to Article VI, Section 1, of the 1850 constitution

> "Municipal courts of civil and criminal jurisdiction may be established by the legislature in cities." (See Article VII, Section 1 of the 1908 Constitution)

3. Circuit courts are vested by the state constitution with jurisdiction and powers of which they may not be deprived by legislation. As distinguished therefrom, the jurisdiction and powers of the superior court are prescribed and limited by Act 49, PA 1875, being CL 1948 and CLS 1956 §727.1-727.38, MSA and MSA 1959 Cum Supp §27.-3611-27-3648.

Nor has the Supreme Court ever held the judge of the superior court to be a circuit judge.

The following cases are cited as demonstrative of the

---

in salary pursuant to the provisions of an act in effect prior to his election or appointment. Opinions of the Michigan Attorney General 1951-52 No. 1284, p 61. See *Taylor vs. Auditor General*, 367 Mich 256 at 266-67 where *State ex rel Mack vs. Guckenberger*, 139 Ohio St 273, 39 NE 2d 840, is discussed.

holding of the Michigan Supreme Court upon the foregoing propositions.

Nichols v. Superior Judge (1902), 130 Mich 187, which was a petition for writ of prohibition to restrain contempt proceedings in the Superior Court. The petition filed in the Superior Court for contempt proceedings alleged that relator committed the offense of subornation of perjury in a criminal case which was being tried in that court. Motion to quash the proceedings for lack of jurisdiction has been denied. The Supreme Court in denying the issuance of writ of prohibition stated at pages 191-194:

> "The legislature is, by the Constitution, authorized to establish municipal courts of criminal and civil jurisdiction. Const. art. 6 §1. [1850] The superior court of Grand Rapids is a creation of the legislature, with such powers and jurisdiction as the legislature has seen fit to confer upon it. We must, therefore, look to the act of the legislature establishing this court to determine what power is given it over the subject of contempts. The statute is silent upon the subject, except as it is covered by the general and broad jurisdiction conferred upon the court. The act gives such court original and exclusive jurisdiction over all criminal proceedings committed within the corporate limits of the city, with certain exceptions, and 'power to issue all lawful writs and process, and to do all lawful acts, which may be necessary and proper to carry into complete effect the powers and jurisdiction given by this act, and especially to issue all writs and process, and to do all acts, which the circuit courts of this State, within their respective jurisdictions, may in like cases issue and do by the laws of the State of Michigan,' Pub. Acts 1875, Act No. 49, §§ 13, 14 (1 Comp. Laws 1897, §§ 630, 631). Under this law the

COPY BOUND CLOSE IN CENTER

superior court is subject only to the control of the Supreme Court. It is governed by the same rules of practice as the circuit courts. Appeals are taken from it to the Supreme Court. In short, it is subject to the mandate of this court in precisely the same manner and to the same degree that the circuit courts are.

"This act is similar in its provisions to the act establishing the superior court of Detroit. This court held that:

"'As respects civil jurisdiction, the superior court [of Detroit] is a tribunal of the same class as the circuit courts. There are no limitations upon its powers. • • • The nature of the subjects of its jurisdiction, so far as the jurisdiction extends, is the same. It is a court of original jurisdiction, proceeding according to the course of the common law.' *Wyandotte Rolling-Mills Co. v. Robinson,* 34 Mich 428.

"See the further reasoning of the court on page 432. See, also, *People, ex rel. Covell, v. Kent County Treasurer,* 36 Mich 332.

"The power to punish for contempt is essential to the due administration of the law, and to carry out the orders, decrees, and judgments of the court. If it was the intention of the legislature to limit the jurisdiction of the court over contempts to the causes specified in section 1098, 1 Comp. Laws,—a law which was enacted long prior to the adoption of the present Constitution, and when there was only one constitutional court, viz., the Supreme Court,—it would certainly have used language appropriate to express such intention. On the contrary, it expressly confers upon the court the same powers in this respect that circuit courts possess under the Constitution. It follows that,

if the circuit courts are clothed with the power to punish for contempts, and are not limited to the cases provided for in the statute, which was enacted under the Constitution of 1835, then the respondent possesses the same power.

"• • •

"The Constitution of 1835 provided that 'the judicial power shall be vested in one Supreme Court, and in such other courts as the legislature may from time to time establish.' Const. 1835, art. 6, §1. The people were dissatisfied with the courts organized by the legislature, and, in the adoption of the new Constitution, made an important change by providing that:

"'The judicial power is vested in one Supreme Court, in circuit courts, in probate courts, and in justices of the peace. Municipal courts of civil and criminal jurisdiction may be established by the legislature in cities.' Const. 1850 art. 6 §1.

"Thus the unlimited power to create courts, given by the Constitution of 1835, was taken away by the new Constitution, and the legislature was limited to the creation of 'municipal courts of civil and criminal jurisdiction.' The reason for this important change in the organization of the courts is stated in *Streeter v. Paton*, 7 Mich. 341."

The court held that the power of circuit courts to punish by contempt was not subject to legislative limitation and concluded at pages 197-198:

"Undoubtedly the legislature has the right to limit control over contempts in those courts which are of

its own creation. *Ex parte Robinson*, 19 Wall. 510. Section 1098, 1 Comp. Laws, is first found in the Revised Statutes of 1846, and has remained without change since that time. It then applied to the courts which the legislature was authorized to create. So, if the legislature, in creating the court in question, had used any language from which it could be inferred that, in establishing it, it intended to limit its powers over contempts, it would undoubtedly be held valid. It did not choose to do so, but on the contrary, it did choose to give it all the powers which were conferred by the Constitution upon the circuit courts in all those matters intrusted to its jurisdiction."

In *Dunham v. Tilma*, 191 Mich 688, the court's writ of mandamus was sought by the then judge of the superior court of Grand Rapids to require defendant controller of the city of Grand Rapids to receive and audit for claim for the payment of additional salary voted him by the city council. The following historical background leading to the dispute there presented is stated in order to facilitate understanding of the issues involved. Section 6 of Act 49, PA 1875, the superior court act, had been amended by Act 177, PA 1905, to provide:

"* * * he shall also receive from the treasury of the city of Grand Rapids from and after May 1, 1906, such additional salary as shall be sufficient, with the sum so received from the state, to make the salary of said judge 3,500 dollars, * * *."

By Act 60, PA 1909, the salary of circuit judges was increased to $3,500 per annum, which act had the effect of terminating any authority in the city to pay additional salary to the judge of the Superior Court. Such was the

situation until the judicature act became effective on January 1, 1916. CL 1948 §681.3. That act fixed the amount of salary payable by the state to the judges of the Recorder's and Superior Court as well as to circuit judges. It also authorized the payment by the city of such additional salary to the judge of the Superior Court as the common council shall vote. CL 1915 §12141. Shortly thereafter, the city council voted to pay Judge Dunham $1,000 per year. The controller refused to pay such additional salary on the ground that Judge Dunham having been elected in April, 1915, payment thereof during his current term was prohibited by Article XVI, §3. The Supreme Court denied the issuance of its writ of mandamus to require making of such payment.

In *Dunham* it was urged upon behalf of relator that he was in fact a circuit judge. He argued that the legislature in providing for the Superior court had merely made a division of the circuit court of Kent county, carving out jurisdiction therefrom on a territorial basis. The Supreme Court in rejecting such contention, stated at page 691-693:

> "But this is not a correct assumption. The creation of the superior court was not a division of the territorial limits of the Kent circuit court, and the establishment of a new circuit court in the city of Grand Rapids. If that were the case, the superior court would necessarily, and without any grant of the legislature, possess all of the powers guaranteed by the Constitution to circuit courts, inasmuch as those powers are beyond the reach of the legislature. Section 10, art. 7, of the present Constitution provides:
>
> " 'Circuit courts shall have original jurisdiction in all matters civil and criminal not excepted in this Constitution and not prohibited by law, and appellate

jurisdiction from all inferior courts and tribunals and a supervisory control of the same. They shall also have power to issue writs of habeas corpus, mandamus, injunctions, quo warranto and certiorari and to hear and determine the same; and to issue such other writs as may be necessary to carry into effect their orders, judgments and decrees and give them general control over inferior courts and tribunals within their respective jurisdictions, and in all such other cases and matters as the Supreme Court shall by rule prescribe.'

"This leaves to the legislature the right only to determine what causes may be instituted in the circuit courts. It permits to the legislature no control over the general powers of those courts. *Brown v. Circuit Judge*, 75 Mich. 274 (42 N.W. 827, 5 L.R.A. 226, 13 Am. St. Rep. 438); *Nichols v. Judge of Superior Court*, 130 Mich. 187 (89 N.W. 691). The corresponding section of the old Constitution differed in substance but slightly from the present one. This is not the case with municipal courts. They are not created by the Constitution, but only authorized and permitted. They derive all of their powers from the legislature. *Nichols v. Judge of Superior Court, supra.* And the legislature may give them large or limited powers. In either case they are still municipal courts, and belong to that classification. They are not courts of 'general jurisdiction,' in the sense in which that term is applied to circuit courts. Their nature is defined, and the source of their power is stated, in *Covell v. Treasurer of Kent County*, 36 Mich. 332, where this court said:

" 'The court also thinks that under the Constitution it was competent to establish the superior court. The Constitution, it is true, declares that "the judicial power is vested in one Supreme Court, in circuit courts,

in probate courts and in justices of the peace." But it also in the same section declares that "municipal courts of civil and criminal jurisdiction may be established by the legislature in cities." Article 6, §1. This is a plain reservation to the legislature of the power to carve out of the judicial power vested in the other courts named such authority as it would be proper to confer upon city courts, and to create such courts for its exercise. Where that is done, the legislature must determine the extent of the authority to be given the municipal courts, subject to the restriction that it must not exceed that which can properly pertain to a municipal court.' "

The reasoning of the Court in *Dunham* was followed by the Court in *Mooney v. Unemployment Compensation Commission,* 336 Mich. 344, 352, in differentiating between the jurisdiction vested in the circuit and Superior Courts as regards appeals from the unemployment compensation commission.

Consistent with those decisions, the Michigan court by either unanimous or majority opinion has likewise held that inasmuch as the superior court of Grand Rapids is not a circuit court, nor petitioner as the judge thereof a circuit judge, he would not come within the exception in Article XVI, Section 3, against increasing his salary following election, and, therefore, he was not entitled to receive during his current term an increase in salary resulting from an act adopted by the legislature after his election. As above noted, the series of litigation between petitioner and the state officials involving this issue has reached the Michigan Supreme Court on three occasions.

Petitioner was re-elected as judge for a six-year term commencing on May 1, 1953. By Act 155, PA 1954, effective

COPY BOUND CLOSE IN CENTER

August 13, 1954, the salary of circuit judges was increased from $9,000 to $12,000 per annum. In *Taylor vs. Auditor General,* 342 Mich 265, he sought mandamus to require the payment to him of a salary in accordance with the increased rate specified by Act 155. The suit was defended upon the ground that the payment of the increased salary was prohibited by the above quoted provisions of Article XVI, Section 3, of the Constitution. Plaintiff, however, contended that he was not relying upon Act 155 by which the salary payable to circuit judges was fixed, but rather upon section 6 of Act 49, PA 1875, the superior court act, which section was last amended by Act 275, PA 1949. The Supreme Court in denying issuance of the writ of mandamus by reason of such constitutional bar, stated at page 267, 268:

> "But the 1949 act makes no provision for an increase of salaries of superior court judges during term. If it should be so construed, it would run counter to the inhibition in article 16, §3 * * *."

and concluded at page 269:

> "The provision of the Constitution is clear. The legislature cannot fix plaintiff's salary by reference and thus circumvent the express constitutional inhibition against the increase of plaintiff's salary during term. He is not a circuit judge, does not come within the plainly worded exception to the constitutional inhibition, and his salary cannot be increased during term."

Shortly prior to the end of his last term of office as judge of the superior court of Grand Rapids, petitioner instituted the case at bar in the court of claims for the State of Michigan to recover the difference between the salary paid to circuit judges and that received by petitioner

during the period from January 10, 1942 to May 1, 1959. Respondents as defendants filed motion to dismiss the action and at the outset of the hearing thereon petitioner amended his pleadings to strike the ad damnum clause and insert in lieu thereof a prayer for declaration of rights under the statute. Defendants were permitted to amend their motion by inserting the additional ground that "the court of claims does not have jurisdiction for declaration of rights." The court of claims granted the motion to dismiss basing its decision upon the last mentioned ground. Appeal therefrom resulted in *Taylor vs. Auditor General*, 360 Mich 146. No federal question had been raised by the pleadings. The majority opinion, written by Justice Talbot Smith, and concurred in by Chief Justice Dethmers and Justices Carr, Edwards and Souris, affirmed the holding of the court of claims based upon lack of jurisdiction, and also answered the claimed denial of equal protection of law in violation of the 14th Amendment of the Federal Constitution, which issue was raised by Mr. Justice Black in his dissenting opinion. Justices Kelly and Kavanagh concurred in affirmance restricting their opinion to the lack of jurisdiction of the court of claims to render declaratory judgments. The majority and dissenting opinions in that appeal set forth the views of the members of the court upon the issue raised by petitioner in seeking certiorari in the case at bar. We therefore quote from that portion of the majority opinion commencing at page 152:

> "The opinion of Mr. Justice BLACK, we note in closing, applies a theory plaintiff expressly disavowed to a constitutional argument plaintiff did not make to invest the court of claims with a jurisdiction it does not have. All of this is directed to the position that public officials' constitutional invulnerability to changes in salaries during their terms of office somehow or other offends the equal protection clause of the Con-

COPY BOUND CLOSE IN CENTER

stitution. Such conclusion is totally unsupported by applicable precedent and completely oblivous to the reasons for the adoption of the constitutional provision respecting salary stability.

"We are constrained to observe that it is with considerable reluctance that we enter upon the discussion of any legal issue so intimately integrated with our own welfare as the principles applicable to the increase or reduction of judges' salaries. We share the feeling of the United States supreme court expressed in *Evans v. Gore,* 253 US 245 (40 S Ct 550, 64 L ed 887, 11 ALR 519), wherein the court prefaced its holding, in a case involving taxation of judges' salaries, with these words: 'Because of the individual relation of the members of this court to the question, thus broadly stated, we cannot but regret that its solution falls to us. * * * But jurisdiction of the present case cannot be declined or renounced.' Here, however, the constitutional question has been intruded with the case wholly needlessly. The court of claims has no jurisdiction to render the declaratory judgment prayed, and, if it had, the most serious questions would arise as to how many times this plaintiff may litigate what is essentially the same question, namely, his salary claims.

"We do not rule upon the position that the superior court of Grand Rapids is a circuit court and the judge thereof a circuit judge. The point was neither relied upon nor briefed by either party to this litigation. In fact we find in plaintiff's brief in this case, and in his prior case seeking salary adjustment, a repudiation and disavowal of such argument, for reasons not obscure. The point had been squarely ruled upon and properly rejected in *Dunham v. Tilma,* 191 Mich 688.

"The plaintiff, then, by his own admission, is not, and does not claim to be, a circuit judge. In this posture of the case we did not consider, nor did any party brief to us, the question of whether or not plaintiff's salary deficiency if a circuit judge, and as a circuit judge, which he was not, when compared with the salary of a 'nearby' circuit judge, involved either a denial of plaintiff's right to equal protection under the Fourteenth Amendment of the Constitution of the United States or the Constitution of this State. Even had the question been before us, however, it would not have been ruled upon under the view we have taken as to the jurisdiction of the court of claims, for few principles of judicial interpretation are more firmly grounded than this: a court does not grapple with a constitutional issue except as a last resort. Yet, as we noted, since such constitutional issue has been intruded into the case, however gratuitously, further discussion is in order lest our silence be construed as acquiescence in the propositions asserted with respect thereto.

"The adoption of the original constitutional clauses respecting changes in salaries of public officials during their terms of office resulted from interference with the independence of the judiciary through the power of the purse during Revolutionary times. This was one of the principal causes of complaint in this era. The Declaration of Independence itself, setting forth the tyrannies of the English king, asserted that: 'He has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries.' As a result most State constitutions, as well as the Federal, contain provisions seeking to protect judicial, or, in some cases, all public

COPY BOUND CLOSE IN CENTER

officials' salaries from alteration, in one form or another, by the legislatures.

"Thus we have, in this State, a constitutional provision forbidding the increase, except for 'circuit judges,' or the decrease, of the salaries of public officers after their election or appointment. Such a provision must inevitably result, in event of salary increases, in subsequent salary differences between judges, other than circuit judges, elected for non-simultaneous terms. There is no doubt, then, that an actual inequality as to salary may exist between those occupying the same office and doing the same work. But is this an unconstitutional inequality, that is to say, an inequality offensive to constitutional principles? That will depend upon the reason and purpose of the provision creating the inequality. Here the constitutional draftsmen must weigh the actual inequality conceded to exist at times against the evils conceivably attendant upon a lack of such provision. The purpose of such provisions, according to Alexander Hamilton, was to restrict the power of the legislature, so that it could 'neither weaken [the public officer's] fortitude by operating on his necessities, nor corrupt his integrity by appealing to his avarice.' Whether such provisions outweigh considerations of arguable injustice to public officials elected for long terms has been a matter of debate, as has the extent or severity of the clause forbidding change.

"But the debate, for us, has been resolved. The constitutional provision against raising or lowering salaries is, as we have noted, a common feature of many State constitutions, including that of our State, as well as the Federal. These provisions have been

> a part of the several constitutions since earliest times. They have been construed again and again, as reference to any standard digest will disclose. The weakness of the novel position asserted is best demonstrated by the fact that he who asserts it, and who thus has the burden of establishing it, does not cite to us a single applicable case wherein it has been held that judges performing like functions must receive the same salaries, even though the receipt thereof must involve an increase during the term of office, in the teeth of a constitutional provision to the contrary."

Following the return of the case to the court of claims, petitioner again amended his pleading to strike the prayer for declaratory judgment and reinsert the ad damnum clause. Answer was filed raising various defenses, including res judicata and statute of limitations. Both parties moved for judgment upon the pleadings and judgment in favor of plaintiff was entered in the court of claims, which was reversed by the Michigan Supreme Court in *Taylor vs. Auditor General*, 367 Mich 265. Chief Justice Carr wrote the majority opinion with Justices Dethmers, Kelly and Souris concurring. The majority opinion reviewed prior decisions of the Michigan court holding the superior court of Grand Rapids to be a municipal rather than a circuit court, and the judge of the court a municipal judge rather than a circuit judge. The court rejected petitioner's contention that "the superior court of Grand Rapids may be regarded as a circuit court and the judge thereof classified as a circuit judge within the meaning of Article XVI, Section 3 of the State Constitution." The opinion emphasized the distinction that circuit courts are vested by the Constitution[3] with jurisdiction and powers

---

[3] 1908 Michigan Constitution, Article VII, Sections 8-12.

COPY BOUND CLOSE IN CENTER

of which the court may not be divested by legislative action, while the extent of the jurisdiction and powers of the superior court is prescribed by and subject to legislative action.

The court further noted at pp 268-9, that prior to January 1, 1909, the effective date of the 1908 Constitution, the legislature was barred from increasing the salary during their current terms of office of either circuit judges or the judge of the superior court of Grand Rapids. The opinion reasoned that had the framers of the 1908 Constitution intended to include the judge of the superior court with circuit judges within the exception to Article XVI, Section 3, specific reference would have been made, and absent any such reference there was "no basis for any inference that an unexpressed inclusion was intended." Justice Black with Justice Kavanagh concurring, wrote a dissenting opinion. Justices Adams and Otis Smith did not sit. Neither the majority nor dissenting opinion make any reference to the 14th Amendment or claimed violation of its equal protection clause. Apparently, insofar as the Michigan court is concerned, that issue was settled by its prior decision in *Taylor vs. Auditor General,* 360 Mich 146. Instead the two opinions dealt with the issue as to whether payment of petitioner's salary during his current term upon the basis of the increased annual amount payable to circuit judges was barred by Article XVI, Section 3, of the Michigan Constitution. In order that there be no misunderstanding as to respondents' position on that issue, we point out the following distinction which respondents have made throughout this series of litigation:

> A public officer is entitled to the benefit of an increase in salary during his current term resulting automatically from fluctuation of population or other factors in accordance with a predetermined formula prescribed by a salary-fixing body prior to his election. He is not

entitled, however, during his current term to receive such an increase resulting from legislative action taken following his election, even though such action is directed to a second act by which his salary is measured.

Thus, the decision in *Taylor vs. Auditor General*, 367 Mich 256, review of which by this court is sought by petitioner, dealt solely with the issue of the construction and application of Article XVI, Section 3, of the Michigan Constitution, rather than with the denial of equal protection of the law. Thus, it might well be contended that no federal question was properly presented. However, that question having been considered by the Michigan Supreme Court in its prior decision in 360 Mich 146, and thereafter raised by amendment to petitioner's pleadings, we prefer to base our opposition to the issuance of this court's writ of certiorari upon the ground that no substantial federal question is presented.

Petitioner's contention that he has been deprived of equal protection of the law is based upon the construction placed upon the exception of "circuit judges" from the bar of Article XVI, Section 3, of the Michigan Constitution against increasing the salary of public officers after election or appointment so as to exclude petitioner as judge of the superior court of Grand Rapids from the benefit thereof. Such contention necessarily challenges the basis for the classification adopted.

Article XVI, Section 3, of the Michigan Constitution has never been amended since the adoption of the Constitution in 1908. That constitution was drafted by a Constitutional Convention. As stated in the Debates of the Constitutional Convention of 1907-08, the pertinent portions of which are set forth at length as Appendix A of this brief, the consider-

COPY BOUND CLOSE IN CENTER

ations which prompted the exception of circuit judges from the prohibition against increasing the salary of public officers following election were:

1. Circuit judges are elected for the longest term of any officer, aside from nonsalaried members of the governing board of certain educational institutions, *the term of which is fixed by the constitution.* Presumably, it was felt that the salary fixing bodies should not be barred during their 6-year term from taking action to increase the salary payable to circuit judges.

2. Under the 1908 Constitution (Article VII, Section 12), as distinguished from the 1850 Constitution, each county in the state would be at liberty to augment the state salary. The delegates recognized that the board of supervisors of counties not previously permitted to vote a judge a county salary should not be limited to a period between the effective date of the constitution and the succeeding election of circuit judges within which to take such action.

3. The fact that a substantial number of circuit judges served in circuits each of which were composed of several counties and as a practical matter it would be difficult to obtain action by the board of supervisors of each of those counties prior to each election of the circuit judge of that circuit.

No argument is required to demonstrate that none of these considerations is applicable to the judge of the Superior Court of Grand Rapids.

We suggest that the foregoing considerations present a reasonable basis for the classification adopted by the framers of the Michigan Constitution in excepting circuit judges from the prohibition of Article XVI, Section 3,

against increasing the salaries of public officers following their election. Further, that the construction placed upon such exception by the Michigan Supreme Court so as to exclude the judge of the superior court of Grand Rapids therefrom does not result in invidious discrimination violative of the equal protection clause of the 14th Amendment. We urge, therefore, that the Michigan Supreme Court was correct in its majority opinion in *Taylor vs. Auditor General*, 360 Mich 146, 152-156, in denying petitioner's contention in that regard.

Since the issuance of the last cited opinion, a somewhat similar issue has been litigated in the federal courts. In *Kavanagh, et al, vs. Brown, et al*, 206 F Supp 479, two members of the Michigan Supreme Court brought an action in the federal district court contending that Article XVI, Section 3, of the Michigan Constitution was violative of the equal protection clause in that application thereof resulted in the payment of their salaries at a lesser annual rate than that paid to other members of the court who had commenced serving their last term thereon since the effective date of the amendatory statute providing for an increase in the annual salaries of the members of the court. Opinion was rendered by a three-judge court, and after citing various decisions of this court in cases in which it was claimed that statutes resulting in certain inequalities violated the equal protection clause, the opinion concluded at page 485:

> "• • • Our function is to apply the law as laid down by the United States Supreme Court. We are convinced that according to its precepts we may not here declare Article 16, § 3, to be violative of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. 'It is a salutary principle of judicial decision, long emphasized and followed by this Court, that the burden of establishing the unconstitu-

COPY BOUND CLOSE IN CENTER

tionality of a statute rests on him who assails it, and that courts may not declare a legislative discrimination invalid unless, viewed in the light of facts made known or generally assumed, it is of such a character as to preclude the assumption that the classification rests upon some rational basis within the knowledge and experience of the legislators. A statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it.' *Metropolitan Co. v. Brownell,* 294 U.S. 580, 584, 55 S. Ct. 538, 540 (1935). We are not convinced that an apparently reasonable basis for the alleged discrimination does not exist, or that the statutory (constitutional) discrimination is invidious. We are unable to say that this provision does not provide equal protection of the laws."

The resulting judgment was affirmed on motion by this court. *Kavanagh, et al vs. Brown, Treasurer of Michigan, et al.,* 371 US 35, 9 L ed 2d 112.

We submit that the decision of the Michigan court in the case at bar, as set forth in its opinions in 360 Mich 146 and 367 Mich 256, is supported by the rationale of the following decisions of this court filed on May 29, 1961, in the Sunday Closing Cases:

McGowan v. State of Maryland, 366 US 420;

Two Guys from Harrison-Allentown, Inc. v. McGinley District Attorney, 366 US 582;

Braunfeld v. Brown, Commissioner of Police, 366 US 599;

Gallagher, Chief of Police v. Crown Kosher Super Market of Massachusetts, Inc., 336 US 617.

Mr. Justice Frankfurter filed a separate concurring opinion applicable to all four cases. Concerning the challenge that the equal protection clause was violated, he announced applicable law in these words:

> "The restricted scope of this Court's review of state regulatory legislation under the Equal Protection Clause is of long standing. *Lindsley v. Natural Carbonic Gas Co.*, 220 US 61, 78, 79, 55 L ed 369, 377, 378, 31 S Ct 337, Ann Cas 1912C 160. The applicable principles are that a state statute may not be struck down as offensive of equal protection in its schemes of classification unless it is obviously arbitrary, and that, except in the case of a statute whose discriminations are so patently without reason that no conceivable situation of fact could be found to justify them, the claimant who challenges the statute bears the burden of affirmative demonstration that in the actual state of facts which surround its operation, its classifications lack rationality." (366 US 534)

Petitioner has not sustained the burden of demonstrating that invidious discrimination has resulted from the application of Article XVI, Section 3. On the contrary, the provisions thereof are based upon considerations which constitute reasonable basis for the classification adopted.

CONCLUSION

The exception of circuit judges from the constitutional bar against increasing the salary of public officers following election or appointment is based upon considerations which render the resulting classification reasonable and not violative of the equal protection clause.

COPY BOUND CLOSE IN CENTER

None of those considerations is applicable to the judge of he superior court. Thus, the Michigan Constitution in differentiating between circuit judges and judge of the superior court is likewise reasonable and does not deprive petitioner of equal protection in violation of the 14th Amendment.

No substantial federal question is presented. Therefore, he petition for issuance of this court's writ of certiorari hould be denied.

Respectfully submitted,

FRANK J. KELLEY
Attorney General for the State of Michigan

Robert A. Derengoski
Solicitor General

Attorneys for Respondents

Business Address:
The Capitol
Lansing, Michigan

APPENDIX

APPENDIX A

The following extracts are taken from the Debates of the Michigan Constitutional Convention of 1907-08.

The Committee on Arrangement and Phraseology proposed to the Convention a revised section to be incorporated in the new Constitution and to read as follows:

> "Sec. ..... Neither the legislature nor any municipal authority shall grant or authorize extra compensation to any public officer, agent, employe or contractor after the service has been rendered or the contract entered into. Salaries of public officers shall neither be increased nor decreased after their election or appointment."

In the debates that followed on the floor of the Convention it was said:

> "MR. KNOWLES: Mr. President, I move to strike out the entire clause two of this proposal.
>
> "The question being on the motion,
>
> "MR. KNOWLES said: Mr. President and gentlemen of the Convention: I am rather reluctant to suggest any changes to any proposal that comes out from the committee, but it seems to me that this clause if passed will bring about a very serious mistake. 'Salaries of public officers shall neither be increased nor diminished after their election or appointment.'
>
> "By referring to Section 6 of Article VI of the old Constitution, we find that in this article the legislature

is given power for the election of more than one circuit judge in a judicial circuit in which the city of Detroit is situated, in which Saginaw is situated, and in which Grand Rapids is situated, as well as St. Clair county. This provision goes on to state that 'the circuit judge or judges of such circuits, in addition to the salary provided by the Constitution, shall receive from their respective counties such additional salary as may from time to time be fixed and determined by the board of supervisors of said county.' Amendments have been made to this Constitution at various times; in the same section the board of supervisors of each county in the Upper Peninsula and in the counties of Bay, Washtenaw, Ingham, Genesee and Jackson, and the counties in the judicial circuit in which the county of Isabella is or may be situated, have this same provision.

"The people of the state considered it of sufficient importance to amend the Constitution in all of these cases and give the judges additional salaries so that at the present time we have in the state of Michigan twenty-three circuit judges who are receiving additional salaries, I mean over and above the twenty-five hundred dollars provided for in this Constitution. It seems to me that if this clause two is adopted it will interfere with additional salaries being paid to judges. The proposal which has been reported today by the Judiciary Committee, as a recommendation of the alteration of Section 6 Article VI for the new Constitution will provide that the legislature may sanction the election of more than one circuit judge in any judicial circuit, and that each circuit judge, in addition to the salary provided by the state, may receive from the respective counties comprising such circuit, such additional salary as may from time to time be determined by the boards of supervisors of said counties. In other words, it

places Section 6 Article VI in such a way that if at any time a judge should receive an additional salary, as twenty-three of our judges do now receive, the board of supervisors may vote this extra compensation without an amendment to the Constitution. If that is to be a provision in the new Constitution, certainly then clause two which states that 'Salaries of public officers shall neither be increased nor diminished after their election or appointment,' will conflict with it. I make my motion to strike out this clause and leave the proposal in the same condition as it was in the old Constitution, which will allow the boards of supervisors to vote additional salary for circuit judges.

"MR. H. M. CAMPBELL: Mr. President, when the question was asked of me as chairman of the Committee on Legislative Department, as to what the effect would be of this provision upon the proposal which Mr. Knowles has just referred to as being under consideration, I was unable to answer him because I had not then seen either proposal. Since that time, however, I have examined the proposal, and I am inclined to think there might be a serious doubt as to whether it would not conflict with this section if permitted to remain as reported out by the committee. I think that all of us recognize the desirability of permitting the salaries of circuit judges to be increased in the manner in which this proposal which is now before the Judiciary Committee contemplates; and I can see no harm, and in fact I can see a decided advantage in striking out this clause two as proposed by Mr. Knowles in order to accomplish that purpose.

"MR. SNOW: Mr. President, to obviate the difficulty suggested by Mr. Knowles I move as an amendment to the amendment that after the words 'public officers'

there be inserted the words 'except circuit judges.' So that clause two will then read: 'Salaries of public officers, except circuit judges, shall neither be increased nor diminished after their election or appointment.'

"It is seriously contended that this would conflict with the provision that permits circuit judges' salaries to be raised, or additional compensation to be given them, but for that reason clause two ought not to be striken out entirely, because it is a good provision, and if it does conflict with it this would obviate the conflict, and in my opinion it should be passed with the provision inserted.

"THE PRESIDENT: The question is on the amendment of the gentleman from Saginaw (Mr. Snow).

"MR. HEALD: Mr. President and gentlemen of the Convention: I hope that neither the amendment nor the amendment to the amendment will prevail.

"In Kent county the circuit judges receive additional compensation from the board of supervisors. If this clause two remains in the proposal as it is at present, I think you will agree with me that before the circuit judges were elected in Kent county or any other county that the board of supervisors might provide additional compensation for that circuit judge; and then all during his term he would be entitled to receive that compensation instead of feeling that he was subject to the whims of the board of supervisors in the matter of decreasing it, or subject to the whims of the board to have it increased. I see no conflict in that provision with the principle that the board of supervisors before the election of that circuit judge may fix extra compensation for him, and after his election that the board may neither

COPY BOUND CLOSE IN CENTER

decrease it nor increase it. I think that it is a good principle to have in the Constitution, and that neither this amendment nor the amendment to it should prevail.

"MR. BURTON: Mr. President, it seems to me that before the judge is elected or when he is elected that the salary should be fixed, that is the additional salary that he shall receive from the board of supervisors; that he should be content with that salary during the term of his office; he knows what it is, and he knows if this provision stands that he can do no work that will increase his salary; nor can the board of supervisors decrease it. It is very probable that the old provision regarding the election of judges will be entirely remodeled, so if there is any real reason for making an exception in the case of judges it might be done in that provision and not in this.

"There was undoubtedly an effort on the part of the Constitution-makers of 1850 to have this provision incorporated in the Constitution. It is in there in just as plain words as the English language can make it; 'It shall not be lawful hereafter for the legislature to increase or diminish the compensation of any officer during his term of office for which he is elected or appointed,' and it took mighty strong effort on the part of the judges of the supreme court to say that that was a temporary and not a permanent article in this Constitution.

[Note: The Supreme Court had considered this question in the following cases:

The People ex rel. Douvielle v. Manistee Supervisors (1879), 40 Mich. 585;

Hudson v. Attorney General (1907), 150 Mich. 67]

"We in Wayne county have felt the effects of the lack of this provision in the Constitution, in having our officials elected and then after they were elected, after they knew what their salaries were, going to the legislature and getting their salaries increased. There never has been an attempt, so far as I know, to have the salary decreased. I think the provision ought to stand just as it is, just as we have it.

"MR. POST: Mr. President, I agree with the principle as stated by the gentleman from Kent (Mr. Heald) but I have in mind this idea, that perhaps under the recent amendments to the Constitution some of the circuit judges in the circuit, for instance, in which Isabella county is located, have not yet taken advantage of the provisions; and the boards of supervisors of that circuit might desire to fix that salary before another election. In other words the judge of that circuit is now on his term of office, and supposing the board of supervisors at the January session of the board should desire to raise his salary a thousand dollars—they do desire to do it, and in fact are contemplating doing it—but this is only an illustration—they would be barred from doing it under the proposal as it stands at present. That is the only objection I have to it. I think, however, that the argument advanced by the gentleman from Kent (Mr. Heald) is correct; that the proposal is all right as it stands unless it may interfere with some of those circuits to which the right to increase the compensation by the board of supervisors is given under the present Constitution.

"MR. HEALD: Mr. President, if this Constitution is adopted it will not go into effect until a year from the present January, and the board of supervisors would

COPY BOUND CLOSE IN CENTER

have until a year from now, when the Constitution would go into effect, to raise the salary if it wished to.

"MR. WATSON: Mr. President, I hope that the amendment to the amendment will prevail.

"I call attention to the fact that in the Upper Peninsula the judicial circuits are composed of several counties. Now, the greater part of the compensation paid to our circuit judges comes in the nature of extra compensation voted by the boards of supervisors, and if this proposal were to be passed as it stands now, a circuit judge after election would be barred from receiving such extra compensation. In order to get the boards of supervisors of the several counties comprising a judicial circuit to act in unison in providing extra compensation before election of a circuit judge it would be necessary for someone to have it in mind in order to have it done. Now, there is no officer of the judicial circuit that would have any interest in the matter unless it be some volunteer, except the circuit judge himself; and it would put him in rather an unenviable position to go around the circuit seeking to have his compensation fixed. No circuit judge would do it. Furthermore it has been the practice of the boards of supervisors to fix the salaries of officers once every two years, and when these salaries are fixed the compensation of the circuit judge is also fixed. Unless there is a special provision made in this Constitution I do not think the boards of supervisors would feel justified in binding their successors for six years. It therefore would be necessary to except circuit judges in order to give our circuit judges in the Upper Peninsula and other circuit judges permission under the Constitution to enjoy that extra compensation. I do not think any harm will come

from excepting circuit judges from this provision. I sincerely hope that the amendment to the amendment will prevail.

"MR. FYFE: Mr. President, I rise only because of the fear I have that this clause will affect the circuit judges of the state adversely. The term is a long one, —six years—the salary is twenty-five hundred dollars. It is scarcely possible for the judges to take care of their families on that salary and the board of supervisors of a large number of counties have added to the amount. The Judiciary Committee has carried out that idea, and in one of the reports made by that committee it provides that extra compensation may be given to those judges just as the old Constitution provided in the several instances mentioned therein. It is true that when a judge is elected he knows what he is going to get, that he is to draw twenty-five hundred dollars. The term is long, however. Many changes may occur in the business of the circuit during that time. No matter what changes do occur, the salary can neither be increased nor diminished during that period. That circuit judge, as my brother Watson has suggested, would not take upon himself the duty—and it would be a duty really —of interviewing the boards of supervisors and having his salary increased for the next six years. A new judge could not possibly do that. The result would be that the salaries of those judges that are now fixed at twenty-five hundred dollars would remain at that figure for an indefinite number of years. It would simply compel those judges to accept that salary and to continue to take it without any increase upon the part of the board of supervisors, no matter what increase of expense or of business might arise during the term. I think one or the other of the two amendments ought to be carried.

COPY BOUND CLOSE IN CENTER

"MR. HALL: Mr. President, I trust this proposal will pass as it has been reported out.

"Judges, when they accept their office, know what they have to depend upon. I think the idea of the supervisors or anyone else adding to the salary is wrong. Should some one volunteer in behalf of the judge to have the supervisors act in the matter, the judge necessarily feels kindly towards such person, and such a person perhaps living in the circuit might have an undue advantage over others. Let the salary be fixed, and let the judge accept it as it is or allow some one else to take the office.

"MR. FLANNIGAN: Mr. President, we have listened to the objections to a constitutional clause that shall prevent a board of supervisors from either increasing or diminishing the amount of extra compensation of a circuit judge during the term of his office. I am in entire sympathy with the effort to prevent boards of supervisors from disturbing a circuit judge's salary so far as decreasing it is concerned. It is more important that this provision of the Constitution be framed so as to prevent the boards of supervisors from decreasing the salary of the circuit judge as it is to permit an increase of such salary during the term of the office of the judge. That thought has not entered into the provision at all. We do not know how the Judiciary Committee has treated the subject of extra compensation for circuit judges. It would strike me that before we dispose of the proposal now under consideration we ought to see the report of the committee on that subject; and if it is in order I move that this proposal be passed for the day, and in the meantime I suppose we will be able to see the report which is in the hands of the secretary.

"THE PRESIDENT: The motion is in order if the gentleman desires to make it.

"MR. FLANNIGAN: I do make it, Mr. President.

"The question being taken on the motion of Mr. Flannigan, the motion was agreed to."

[Constitutional Debates, Vol. 1, pp. 448, 449, 450, 451]

When the matter came up for consideration on the next day, January 1, 1908, the following transpired:

"THE PRESIDENT: This proposal was read for the second time yesterday, and a motion was made by Mr. Knowles to strike out clause two. Mr. Snow moved to amend by inserting the words 'except circuit judges' after the word 'officers' in line seven. When the matter was passed the question was on the amendment offered by Mr. Snow, the amendment taking precedence of the motion to strike out. The question is on the amendment.

"MR. FLANNIGAN: Mr. President, I desire to offer the following amendment:

"(Read by the secretary): Substitute for clause two, File 113, 'Salaries of public officers except circuit judges shall not be increased, nor shall the salary of any public officer be decreased, after their election or appointment.'

"The question being on the amendment,

"MR. FLANNIGAN said: Mr. President, this substitute has been submitted to both Mr. Knowles and Mr.

COPY BOUND CLOSE IN CENTER

Snow, and is satisfactory to those gentlemen. It is designed, in the substitute, to prevent the supervisors from decreasing the salaries of circuit judges during their term of office.

"THE PRESIDENT: Does the gentleman from Saginaw (Mr. Snow) withdraw his amendment?

"MR. SNOW: Yes, Mr. President, I withdraw my amendment.

"THE PRESIDENT: The gentleman from Charlevoix (Mr. Knowles) does he also withdraw his motion?

"MR. KNOWLES: Yes.

"THE PRESIDENT: The question then is on the substitute offered by the gentleman from Dickinson, Mr. Flannigan.

"MR. BURTON: Mr. President, I cannot understand the necessity for excepting circuit judges from this provision. Are circuit judges any better than anybody else? Is there any reason why a circuit judge should not have his salary fixed the same as any other employe? It has been said here that the circuit judge holds his office for six years, and that is a long period. Why, we hire men all the time for longer periods than six years, and we fix the salaries they are to receive, beforehand—in advance. The matter of their salary is talked over with them, and they agree to it. Is there any reason why circuit judges should not do this as well as any other individual? Before the election takes place practically, which is in November, the boards of supervisors meet, and they fix the salary or the portion of the salary that each county is to pay in excess of the salary

paid by the state to circuit judges, for the succeeding year. When a circuit judge comes up for election the salary has been fixed, and he knows what it will be for the succeeding six years, and he knows that that salary will not be increased during that period, and he knows that it will not and cannot be decreased during that period. A circuit judge is no better than any other employe. If his salary is to fluctuate, to be more this year and less the next, during the entire time that he is in office, he may go to the board of supervisors each year and 'log-roll,' and get the board to increase the salary, and there will be people around him and around the board of supervisors asking the board to increase his salary, and there will thus be an inducement held out to the judge to decide cases in favor of the party who helps him as against the man who does not help him. It is only right that this salary should be fixed in advance, and he should know what it is, and also know that it will not be diminished during his term of office.

"MR. FLANNIGAN: Mr. President, satisfactory reasons why the boards of supervisors should be permitted to increase the salary of a circuit judge during his term of office were given to the Convention yesterday. I got into the discussion of this matter on the question of the authority of the board of supervisors to decrease the salary of a circuit judge during his term of office. I am satisfied they should not have that authority. I have in mind, Mr. President, one instance which occurred within my own knowledge in the state of Michigan. A minister of the gospel who was inclined to enforce the observance of the liquor law walked on the public street of a certain city in this state and looked through the windows of a saloon for the purpose of observing whether or not that saloon was illegally open.

COPY BOUND CLOSE IN CENTER

The proprietor, a great big burly saloon-keeper, saw the minister looking into the window; he walked out of his saloon and assaulted that minister on the street, abusing him most shamefully. He was arrested for assualt with intent to do great bodily harm less than the crime of murder. Unfortunately, (or perhaps it would have made no difference with the result) at any rate the circuit judge could not find evidence enough in the case to warrant his submitting the question to the jury whether or not this man was guilty of assault with intent to do great bodily harm; but that he assaulted the minister and threw him down on the street there was no question; nobody denied that in the case. The jury was finally sent out for the purpose of determining whether or not this saloon-keeper was guilty of assault and battery. The jury was out a long time and was unable to agree. The circuit judge called the jury in, and in very plain language intimated that there could be no question but what this man was guilty of assault and battery. The jury was sent back to their jury room, and after a time returned into court with a verdict of not guilty. Upon that result being announced in the court room the judge said some sharp words to the jury, and not only discharged it from the consideration of that particular case but discharged it for the remainder of the term. Upon that panel there happened to be two or three supervisors, and I believe one or two men who had influence with the board of supervisors. So at the next meeting of the board of supervisors of that county the extra compensation voted by the county to the circuit judge was cut off.

"Now, gentlemen of the Convention, do we wish to leave the constitutional provision in shape to admit of another such attack on any circuit judge?

"THE PRESIDENT: The question is on the substitute offered by the gentleman from Dickinson (Mr. Flannigan).

"The question was taken on the substitute and upon a division, yeas 47, nays 29, the substitute was agreed to.

"THE PRESIDENT: The question is on the passage of the proposal as amended.

"The question being taken on the passage of the proposal as amended, there were yeas 72, nays 13 as follows:

" * * * ."

[Constitutional Debates, Vol. 1, pp. 468, 469]